IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2613 OF 2005.
IN
FIRST APPEAL ST.NO. 9733 OF 2005.

M/s.Packing Paper Products. ... Applicant.
Versus.
M/s.NICAF (P) Ltd. ... Respondent.

Shri K.R.Parekh for the Applicant.

Shri A.K.Goel for Respondents Nos.1 and 2.

Shri J.Xavier for the B.M.C.

CORAM : ABHAY S.OKA, J.

DATED : 27th MARCH, 2006.

P.C.:

1. Heard the learned Advocate for the Applicant and the learned Advocate appearing for the Respondents Nos.1 and 2. This is an application for condonation of delay in filing the First Appeal. The delay in preferring the Appeal is of 3 years and 29 days. This application is strongly opposed by the Respondents Nos.1 and 2.

2. The Applicant is the original Defendant No.3. It appears that the suit filed by the Respondents Nos.1 and 2 was dismissed in the year 2001. The case of the Applicant in the application is that the suit was restored on 12th September 2001 and no notice of restoration of the suit was given to the Applicant. According to the case of the Applicant, he came to know about the passing of the impugned decree on 21st July

2003 and on 28th July 2003 he applied for a certified copy of the impugned Judgment and Decree. On 11th August 2003 a Notice of Motion was taken out by the Applicant for setting aside the Decree. When objection was raised regarding maintainability of the Notice of Motion, it was withdrawn on 4th February 2004. Certified copy of decree was ready on 10th September 2004. The present Application is filed on 15th April 2005.

3. There is nothing on record to show that after the suit was restored, notice of restoration was given to the Applicant. The learned Advocate for the Respondents Nos.1 and 2 pointed out that the notice of restoration of the suit was given to the Advocate for the Applicant. There is nothing on record to show that the notice was served on the Applicant. There was no occasion to give notice to Advocate appearing for the Applicant after the suit in which the Advocate was representing the Applicant was disposed of.

4. It is obvious that after the Applicant came to know about the decree, the Applicant adopted a wrong proceeding by filing a Notice of Motion. The Notice of Motion was withdrawn and after obtaining certified copy of the Judgment and Decree, the present Appeal has been filed.

5. Reliance placed by the learned Advocate for the Respondents Nos.1 and 2 on a decision reported in 1978 Mah.L.J. page 767 (Jagdish Krishna Kapur v/s. Vachha & Co.) will not help the Respondents Nos.1 and 2, as there is power vesting in this Court under section 5 of the Limitation Act, 1963 to condone the delay if sufficient cause is made out.

6. An occasion for a litigant to apply for condonation of delay arises only when there is some default on the part of the litigant. As held by the Apex Court, a liberal approach is to be adopted while deciding the application for condonation of delay. The fact remains that the Applicant remained absent after the suit was restored as he was not given notice of restoration. A case is made out for condonation of delay. The loss which may be caused to the Respondents Nos.1 and 2 can always be compensated by ordering payment of heavy costs.

7. Hence sufficient cause is made out for condonation of delay subject payment of costs of Rs.10,000/- by the Applicant to the Respondents Nos.1 and 2. Hence the following order is passed:

i) Application is allowed in terms of prayer

clause (a), subject to condition that the Applicant will pay costs of Rs.10,000/- to the Respondents Nos.1 and 2 within a period of four weeks from today. If the amount of costs is not deposited or paid within the period of four weeks, the Application will stand rejected.

ii) The deposit of the amount of costs in the trial Court within the stipulated period will be considered as sufficient compliance with this order.

iii) Office will assign appropriate date of hearing as to admission of the First Appeal.

Judge.